No. 03-215

IN THE

Supreme Court of the United States

BRIDGEPORT MUSIC, INC.; SOUTHFIELD MUSIC, INC.; WESTBOUND RECORDS, INC.; and NINE RECORDS, INC.,

Petitioners,

v.

STILL N THE WATER PUBLISHING and N-THE WATER PUBLISHING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF

Petitioners accurately presented the pertinent case facts, procedural history, and state of the law on personal jurisdiction in asking this Court to provide further guidance in the wake of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Respondent NTW fails to give this Court one sufficient reason to deny the Petition. NTW devotes more than half of its response agreeing with Petitioners that the federal courts are splintered in their attempts to reconcile *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), with the three plurality opinions in *Asahi*. Resp. Opp. at 10, 12-23. How Petitioners or Respondent choose to characterize the nature of the circuit split is beside the point. The undeniable fact remains that, sixteen years after *Asahi*, the courts of appeal have failed to reach consensus on the law of personal jurisdiction, and the time has come for this Court to exercise its discretion to resolve the quagmire.

The unsettled state of personal jurisdiction law is especially troublesome in intellectual property cases because copyright owners expect certainty and stability in the law in order to protect their valuable property interests. The muddled decisions of the courts of appeal have done little to assure certainty and stability in personal jurisdiction. The law changes from circuit to circuit, such that a copyright infringement case brought in the Fifth Circuit may be decided under the "stream of commerce" approach, *see Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 n.13 (5th Cir. 1993), while a copyright infringement case brought in the Sixth Circuit, like this one, is decided under the "stream

of commerce plus" approach. Where federal statutory rights under the Copyright Act are at stake, litigants should not have to meet a varying burden of jurisdictional proof depending upon the law of the circuit where a copyright lawsuit is brought.

Furthermore, the decision of the court of appeals below ensures that a copyright plaintiff alleging infringement against music publishers and related entities residing in different states that are involved in the sale and distribution of an infringing music composition cannot obtain relief in one legal proceeding filed in one federal forum. It is ironic that the result of the court's adoption of the "stream of commerce plus" approach directly contravenes *World-Wide Volkswagen's* admonishment that courts should take into consideration the interest of the states in the efficient judicial resolution of disputes. *Asahi*, 480 U.S. at 115 (O'Connor, J., plurality op.) Petitioners do not seek judicial legislation of a "national contacts" theory for the music industry. Resp. Opp. at 11. Rather, they seek efficient administration of justice under federal law.

Music publishers license the music compositions in their catalogs in a purposeful effort to achieve widespread distribution of them throughout the United States and the world to generate as much royalty income as possible. NTW's Chief Operating Officer, Mr. Toval, admitted this is precisely the objective he seeks to achieve in granting mechanical licenses for inclusion of music compositions on Rap-A-Lot Records and in licensing NTW's catalog with The American Society of Composers, Authors, & Performers, Inc. ("ASCAP"), and Broadcast Music, Inc. ("BMI"), for public performances and other uses by third parties. Resp. Opp. App. at 8a, 13a-14a, 22a-23a. NTW does not exclude any market because it is to NTW's financial advantage to sell compositions in every market. Resp. Opp. App. at 14a.

NTW's point that all music publishers must affiliate with ASCAP or BMI supports Petitioners' contention that the very nature of the music business—which thrives on widespread distribution of music throughout the states and the world—compels re-examination of personal jurisdiction principles that presently prevent copyright owners like Petitioners from enforcing their federally-protected rights.

Petitioners listed in the Petition at 24-25 the actions NTW has undertaken to assure that NTW music compositions find their way into every market, including the state of Tennessee. If NTW's conduct does not constitute purposeful availment of the forum under the stream of commerce theory, it is difficult to imagine what does. *See Triple A Partnership v. MPL Communications, Inc.*, 629 F. Supp. 1520, 1524 (D. Kan. 1986) ("[N]ormally the stream of commerce doctrine is applied to manufacturers of goods or component parts. But there is no logical reason why the doctrine should be restricted" in the music copyright context); *Chi-Lites v. San Juan Music Group, Ltd.*, 99 C 3393, 1999 U.S. Dist. LEXIS 17233 (N.D. Ill. 1999); *Johnson v. Tuff N Rumble Mgt., Inc.*, 99-1374, 1999 U.S. Dist. LEXIS 19574 (E.D. La. 1999); *Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 213-14 (S.D.N.Y. 1995); *Doss v. Alabama*, No. 93-2438, 1994 U.S. Dist. LEXIS 6050 at *5-7 (D.D.C. 1994); *Editorial Musical Latino Americana v. Mar Int'l Records, Inc.*, 829 F. Supp. 62, 66 (S.D.N.Y. 1993); *Payne v. Kristofferson*, 631 F. Supp. 39, 41 (N.D. Ga. 1985); *Testa v. Janssen*, 482 F. Supp. 1195, 1197 (W.D. Penn. 1980). The protection of copyright, and uniform decisions under the Copyright Act, are paramount concerns of the federal judiciary. For these reasons, this Court should grant the Petition.

NTW's response offers little assistance in illuminating the question presented to the Court. NTW fails to address any of the music copyright cases Petitioners cited, Pet. at 13-23, other than to disparage them on the ground they were decided by district courts and to suggest, overbroadly and incorrectly, that the cases cited "have been criticized or questioned by other courts as misstatements of law[,]" citing *Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp.2d 653 (M.D. Tenn. 2002); and *Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp.2d 505, 511 n.5 (S.D.N.Y. 2001). Resp. Opp. at 23. The opinion in *Agarita Music, Inc.*, 182 F. Supp.2d at 662-65, discussed only *Linzer*; *Triple A Partnership*; and *Gray v. St. Martin's Press*, 929 F. Supp. 40 (D.N.H. 1996), and did not criticize these cases, but distinguished them on the facts. The district court in *Fort Knox Music*, 139 F. Supp.2d at 511 n.5, distinguished *Linzer* on the facts and otherwise did not mention other cases Petitioners cited in the Petition.

The Petition is not "replete with mis-characterizations and omissions of important substantive facts" or mis-statements of law. Resp. Opp. at 1, 12. Each point NTW makes is not relevant to consideration of the Petition or is without merit.

NTW's claims concerning parties do not affect consideration of the Petition. That Petitioners are not residents of Tennessee, Pet. at 2, does not affect the personal jurisdictional analysis. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 779 (1984) (observing focus is on defendant, forum and litigation, and plaintiff need not have minimum contacts with forum state).

Petitioners have not tried to take advantage of the fact that the district court asserted personal jurisdiction over other defendants. *See* Resp. Opp. at 1. Petitioners properly focus on NTW's conduct, and did not address other defendants because the information is not relevant to the question presented.

Nothing that NTW states about ASCAP and BMI contradicts the facts included in the Petition. Pet. at 7. Petitioners do not claim that ASCAP or BMI are parties to the litigation. Petitioners emphasize, however, that NTW initially licensed its entire music catalog with ASCAP and BMI through their Tennessee offices, ASCAP and BMI re-licensed NTW's music compositions for use by third parties, and ASCAP and BMI monitor performances, collect performance royalties, and engage in enforcement functions for their members, including NTW. Pet. at 7, 24-25.

NTW explains "the music business" from its point of view, Resp. Opp. at 2-4, relying in part on Mr. Toval's testimony. Resp. Opp. at 4 (citing Resp. Opp. App. 12a, 15a, 18a-20a, and 22a). There is nothing in NTW's explanation to support its erroneous accusation that Petitioners' facts attempt to mis-lead this Court.

In faulting Petitioners for "[trying] to impute to NTW the purposeful contacts with Tennessee of unrelated entities," NTW concedes important facts: (1) that Rap-A-Lot Records had "purposeful contacts with Tennessee" and (2) that "the activities of the manufacturer, marketer, distributor, and seller . . . were purposefully directed to Tennessee." Resp. Opp. at 5. These activities are precisely what NTW facilitates and intends will occur, and NTW itself purposefully directs activity to Tennessee. Pet. at 23-24.

Petitioners have not characterized NTW as directly involved in the manufacturing, distribution and selling processes, but rather have focused on NTW's conduct. Pet. at i, 2, 5-6.

NTW acknowledges that record labels pay mechanical royalties generated on sales of record albums to music publishers. Resp. Opp. at 4. Mr. Toval testified the record labels' exploitation of NTW's music compositions and payment of royalties earned must be accomplished within the parameters of the mechanical license granted. Resp. Opp. App. at 7a, 8a, 13a, 14a, 19a. Consequently, but for NTW's mechanical license, the record label could not legally include NTW's music composition on a sound recording and have it distributed for sale to consumers in the forum state. Similarly, but for the agreement between NTW and ASCAP and BMI, NTW's music compositions could not legally be performed or used by third parties in the forum state.

Petitioners agree with NTW that the district court did not hold an evidentiary hearing and did not make factual findings on the jurisdictional issue. Resp. Opp. at 7. Petitioners deny, however, that they have tried "to capitalize on the fiction of evidentiary findings[.]" Resp. Opp. at 7. In opposition to the motion to dismiss for lack of personal jurisdiction, Petitioners presented evidence, which the lower courts construed most favorably to Petitioners in accordance with controlling law, without considering Respondent's controverting assertions. Pet. App. A at 10a; Pet. App. B at 29a & n.3, 33a, 34a & n.8.

NTW complains that Petitioners portray NTW as granting to others the right to distribute sound recordings when NTW does not own any rights in sound recordings.

Resp. Opp. at 7-8. This is not correct. Petitioners stated that "*NTW granted rights to distribute sound recordings containing NTW's compositions*[.]" Pet. at 24 (emphasis added). Further, Petitioners stated "NTW granted distribution rights, knowing and expecting that the distributor would commercially exploit the recordings in Tennessee and throughout the nation[.]" Pet. at 24. Petitioners' statements are fully aligned with Mr. Toval's testimony. Resp. Opp. App. at 7a, 8a, 13a-14a, 16a.

Finally, NTW's remaining allegations regarding performance royalties, sales over the Internet, and the Bluewater Agreement are all without merit. Petitioners mis-stated nothing with regard to NTW's receipt of performance royalties. *Cf.* Pet. at 24 *with* Resp. Opp. at 8, 15a. Petitioners did not argue in the Petition that sales of NTW's compositions over the Internet or NTW's involvement in the Bluewater Agreement equate with minimum contacts. Petitioners merely explained how those issues were handled below. Pet. at 7, Pet. App. A at 21a; App. B at 32a, 40a.

In its survey of jurisdiction cases, Resp. Opp. at 12-22, NTW parrots most of the information included in the Petition, Pet. at 8-12, but repeatedly misinterprets the Petition and the cases. An illustrative example is the statement that "the Fifth Circuit noted that it has expressly chosen not to extend Justice Brennan's test to copyright or contract cases[,]" Resp. Opp. at 15, citing *Nuovo Pignone, SPA v. Storman Asia M/V*, 310 F.3d 374, 381 (5th Cir. 2002); *Ham*, 4 F.3d at 416, and *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000). In *Nuovo Pignone*, 310 F.3d at 381, the court applied the stream of commerce theory in that contract case; in *Ham*, 4 F.3d at 416 & n.13, a copyright

declaratory judgment action, the court applied the stream of commerce theory, but dismissed for lack of a sufficient nexus between the cause of action and defendants' exploitation activities, noting it might reach a different result in a case alleging infringement of a song; and in *Alpine View*, 205 F.3d at 216, the court concluded it did not have to decide whether the theory applies in a broad range of cases. Much of NTW's remaining legal analysis is similarly suspect.

In any event, a few significant points must be made. It is not true, as NTW suggests, that the court of appeals' decision, issued in May 2003, marks the beginning of a trend. Resp. Opp. at 12, 23. Over ten years ago, the First Circuit noted: "Indeed those circuits that have squarely addressed the stream-of-commerce issue since *Asahi* have adopted Justice O'Connor's plurality view." *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992). The Sixth Circuit has just now joined that camp; it is not setting a trend. Since 1987, the circuit courts have repeatedly attempted to reconcile *Asahi* with this Court's prior jurisdiction cases, and with existing law within the respective circuits. Pet. at 8-12; Resp. Opp. 12-22. Some even fail to recognize that Justice O'Connor's view represents a plurality of the Court. *See, e.g., Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). Only this Court can clarify the law.

NTW notes that courts wonder whether the stream of commerce theory might be limited to products liability cases, Resp. Opp. at 13 (citing *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 444 (2d Cir. 1999)), whether the theory could be applied to a patent infringement case, *id.* (citing *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 299 n.12 (3d Cir. 1985)), or whether the theory applies to a nonresident defendant who grants a royalty-bearing license for intellectual

property that is developed, marketed, and sold in the United States. Resp. Opp. at 16 (citing *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773 (7th Cir. 2003)). The confusion evident in these cases justifies further why this Court should grant the Petition.

Although NTW takes the view that Petitioners seek to appoint record albums as agents for service of process, this Court previously observed that personal jurisdiction may be asserted where the defendant's conduct "is not simply an isolated occurrence, but arises from . . . efforts . . . to serve, directly or indirectly, the market for its product in other States[.]" *World-Wide Volkswagen*, 444 U.S. at 297-98. *World-Wide Volkswagen* and *Burger King* remain controlling, and the stream of commerce doctrine should be applied in this music copyright case to hold that the Tennessee federal court had personal jurisdiction over NTW, based on the evidence Petitioners presented below. *See Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-48 (7th Cir. 1992) ("Because the Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative."); *Triple A Partnership*, 629 F. Supp. at 1524.

CONCLUSION

This Court has an opportunity to clarify personal jurisdiction analysis and to elucidate its application within copyright law. For all of the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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